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No. 430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ARROW TRANSPORTATION COMPANY, ET AL., *Petitioners*

v.

SOUTHERN RAILWAY COMPANY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS THAT SAID ASSOCIATION BE GRANTED LEAVE TO FILE A BRIEF AMICUS CURIAE HEREIN

BRIEF OF SAID ASSOCIATION PRESENTED WITH SAID MOTION

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December 28, 1962

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I

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as "NARUC", is a voluntary organization, the membership of which embraces the members of the railroad and public utility

regulatory commissions and boards of all the States of the United States.

By the Constitution of the NARUC its attorneys may be directed to appear on behalf of the NARUC, as distinguished from the individual commissions represented within its membership, in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the NARUC should be made. This motion and the brief presented herewith are offered on behalf of the NARUC by direction of its Executive Officers in the general public interest.

The instant case presents the question whether a Federal court may enjoin or suspend the effectiveness of proposed changes in railroad rates beyond the statutory period of suspension.

A number of state regulatory commissions are charged with the duty of representing the interest of their respective states in matters before the Interstate Commerce Commission. They are directly concerned with any judicial interpretation of the provisions of Section 15(7) of the Interstate Commerce Act.

In addition, many state regulatory statutes provide for a period of suspension for proposed rate changes in much the same regulatory scheme presented in the Interstate Commerce Act. The regulatory commission in such states are concerned with the outcome of the instant case, since the determination of the equities herein will undoubtedly influence any judicial interpretation of similar provisions of state statutes.

It is the position of the NARUC that the opinion below should be affirmed.

II

The instant case was brought to the attention of the officers of the NARUC by letter dated December 10, 1962, from one of its members. Decision as to NARUC activity regarding the case was made by the Executive Officers of the NARUC on December 17. It was therefore not feasible, with the intervening holidays and the necessary time for printing, to attempt to obtain consent of the parties to the filing of a brief amicus curiae on behalf of the NARUC in compliance with Rule 42 of the Revised Rules of this Honorable Court. It is not known whether such consent would or would not have been granted if time permitted a request to have been made. Under these circumstances, the indulgence of the Court is requested to permit the filing of this motion.

III

Because the regulatory commissions and boards represented in the membership of the NARUC are governmental bodies of the several States of the United States and have a vital interest in any judicial interpretation of Section 15(7) of the Interstate Commerce Act, and because the brief sought to be filed in their behalf is offered in the public interest of the peoples of said States, the NARUC respectfully represents that the filing of a brief, amicus curiae, tendered herewith in this case ought to be permitted.

In support of this motion, the NARUC cites as precedent the decision of this Court upon similar motion made on behalf of the state commissions in *State of New Jersey, et al.* v. *New York, Susquehanna and Western Railroad Company*, Dkt. No. 104, October Term, 1962.

IV

The NARUC, accordingly, presents herewith a copy of the brief which it desires to file, and respectfully moves that it be granted leave to file the same.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

STATEMENT OF THE CASE

Southern Railway Company, et al., proposed certain reduced rates and charges on the transportation of grain in multiple-car lots from certain Ohio and Mississippi River ports to destinations in the southeast. These rates were suspended by the Interstate Commerce Commission under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), for the maximum suspension period until March 9, 1962. Southern

Railway voluntarily extended the effective date of the proposed rates to August 7, 1962, but declined further extension. The rates are still under investigation by the Interstate Commerce Commission.

Petitioners herein sought injunctive relief from the courts to restrain Southern Railway and the other railroads from putting the proposed rates into effect, pending decision by the Interstate Commerce Commission as to their lawfulness.

QUESTION PRESENTED

The question presented is whether the courts may enjoin a change in rates, until completion of an investigation by the Interstate Commerce Commission, beyond the expiration of the period of suspension provided for in the Interstate Commerce Act.

STATEMENT OF POSITION

It is the position of the NARUC that the courts may not enjoin a change in rates, pending ultimate Commission disposition, beyond the period of suspension fixed by statute. The NARUC takes no position regarding the level of rates under investigation.

The position of the Interstate Commerce Commission, as noted by the Solicitor General in the Brief for the United States as *amicus curiae*, deserves comment here. It is highly significant that the Commission disagrees with the position taken by the Solicitor General. For several years before § 15(7) was added to the Act, the Commission had, in its Annual Reports to Congress, asked for a suspension power over proposed rates.* The advice of the Commission was sought by

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* See, *e.g.*, I.C.C. Ann. Rep., 1907, pp. 9-10.

the Congress when § 15(7) was first enacted, and subsequently when it was amended. And, the Commission is the agency charged with administering the Interstate Commerce Act as a whole, including § 15(7). Surely, therefore, the Commission is the institution best qualified to assess the purpose and proper construction of § 15(7), and the effect the contentions of petitioners, if successful, would have on its regulation of interstate commerce under the Act.

ARGUMENT

I. The Power to Suspend Proposed Rates is for a Limited Period Only and Is Vested Exclusively in the Interstate Commerce Commission

The Congress, in a statute aptly described by the Court of Appeals for the Fifth Circuit in its opinion in this case as "a model of clarity" (R. 121), has elected to vest the power to suspend proposed railroad rates in the Interstate Commerce Commission alone, and has limited the period of suspension the Commission may impose to seven months.

Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), states that when a carrier files a tariff the Commission, either upon complaint or its own initiative, may initiate an investigation concerning the lawfulness of any rate, etc. contained in the tariff and, pending its hearing and decision, the Commission,

> "... upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect;

> and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; . . ."

How could Congress have expressed more clearly than in these imperative words the intention that a suspended rate "shall go into effect" at the end of the suspension period? A contrary construction would do violence to the language; and indeed there is no need for "construction" of a statute when its meaning is as plainly spelled out as is that of § 15(7), *supra.*

The decision of the court below, taking the statute at face value, and in so doing avoiding any conflict with the Interstate Commerce Commission's primary jurisdiction, was correct and should be affirmed by this Court. Were the statute far less clear, this result is compelled, if the Commission's primary jurisdiction is to be preserved and chaotic results of judicial interposing with the elaborate structure for regulating freight rates erected by Congress are to be avoided.

Even if petitioners had had a common-law right to the relief they seek, such a remedy could not have continued to co-exist with the carefully planned scheme of regulation Congress has provided, because it would be inconsistent with this scheme—with the effective exercise by the Commission of its primary jurisdiction over rate matters. See *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 473; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426.

As this Court said in *Board of R. R. Comm'rs. v. Great Northern Ry.*, 281 U.S. 412, 429:

> ". . . This power of suspension was entrusted to the Commission only."

In that case it was recognized that before the enactment of § 15(7) (in 1910 [cite])

> "the weight of decision was that such relief [injunctive relief against proposed railroad rates], although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission . . . ." (*Ibid.*)

The argument that such power in the courts was necessary to prevent irreparable injury did not there sway this Court, which noted that

> "in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission." (*Id.* at 430.)

To avoid duplication of the efforts of other parties, we will not go into the legislative history of § 15(7), and the background of the 1910 act which added original § 15(7) to the Interstate Commerce Act. These do, however, amply support our interpretation of the statute. But it is appropriate, we believe, for us to point out the contemporaneous construction accorded § 15(7) by the Commission just eight months after its enactment, in *Advances in Rates—Western Case*, 20 I.C.C. 307 (1911). This bears out the view of § 15(7) and the power of the courts taken by the court below in its opinion. The Commission without cavil said that the thrust of § 15(7), and its effect, was to

supplant any equity jurisdiction the courts may have had to enjoin proposed railroad rates:

". . . Accordingly, for several years past the chief body of protest coming from shippers to this Commission has been against increases in rates, and the Commission being unable to stay these increases, the shippers sought from Congress the enactment of a law by which the power would be given to this Commission, when public reasons made advisable such a course, to lay a restraining hand upon the power and initiative which hitherto had rested with the carrier without limitation or constraint.

"Moreover, the Federal courts found themselves embarrassed by the appeals made to their equity powers against such increases. The courts differed upon the fundamental question of jurisdiction. In the cases where the courts assumed jurisdiction there resulted the greatest discrimination as between individual shippers and carriers, for as to some the increased rate was in effect, while as to others it was not in effect. With such a history before it Congress deemed it advisable to lodge with this Commission, which alone under the Abilene case, 204 U.S. 426, has power to determine the reasonableness of a rate, the power to restrain for a time an increased rate until a determination can be had as to whether this rate conforms to the requirement of the statute or is but the evidence of the exercise of an arbitrary power.

". . . The power to suspend is ancillary to the general power of investigation, it being the mind of Congress that it was a healthier and wiser policy that there should be a reasonable exercise of such power of suspension than that either the courts should continue to inadequately deal by injunctive process with a problem the ultimate solution of which did not rest within their purview, or that the shipping public should be subjected to continu-

ing instability of rates and consequent commercial disturbance . . . ." 20 I.C.C. at 313-314.

The clear words of the statute, this Court's statements in *Board of R. R. Comm'rs.* v. *Great Northern Ry. Co., supra*, the existence of the Commission's primary jurisdiction over rate matters, and the foregoing contemporaneous construction of the statute by the agency charged with its carrying out, not to mention the legislative history which we have not analyzed here, make altogether untenable the position of the petitioners in this case.

II. A Holding That the Courts Have Power to Enjoin Railroad Rates Pending Interstate Commerce Commission Decision as to Their Lawfulness Would Have a Chaotic Effect on the Regulation of Transportation

The ill effects of a decision by this Court upholding the contentions of petitioners are all too apparent. A disruption of the regulatory pattern would be inevitable, with resulting chaos, confusion, discrimination and other evils.

The members of the NARUC are charged with regulation in their respective states of intrastate transportation, so carried out as to protect the well-being of the public in general, shippers, and carriers. Anything acting adversely on the efficient and effective regulation of interstate transportation by the Interstate Commerce Commission must *a fortiori* affect adversely those who regulate on behalf of the several states, and make far more difficult their task of regulation. Further, and very important, a holding by this Court that the Federal courts have power to intervene in ratemaking proceedings prior to final decision by the regulatory agency, where there is a statute like § 15(7)

providing for suspension power in the agency, would be an extremely unfortunate precedent with regard to the administration of the regulatory statutes of the several states, many of which have suspension provisions resembling § 15(7).* While the precedent would not necessarily be binding on state courts, it would be at least highly persuasive. Where followed, it would have much the same ill effects on the regulation of intrastate commerce as on that of interstate commerce. Examination of some of these ill effects is now in order.

A. Lack of Uniformity and Multiplicity of Actions

If the courts should undertake to suspend carrier-proposed rates, even though only for the period of time it takes the Commission to pass on the lawfulness of particular rate proposals, the rate structure would be likely to speedily deteriorate from a lack of uniformity. There would also be a strong likelihood of a multiplicity of actions. This is illustrated by the bringing of suits in district courts in Alabama and the District of Columbia in connection with these grain rates. It is all too likely that in any moderately widespread rate adjustment with a number of different parties concerned, injunction suits would be instituted in several district courts, on varying theories and with an unfortunate variation in result. This, of course, would represent yet another addition to the load on an already overburdened judiciary, as well as a chaotic force exerted upon the rate structure, intrastate as well as interstate.

Rates are often published by several carriers, to be effective in different jurisdictions. All the carriers

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* See, *e.g.*, ALA. CODE TIT. 48, § 54 (1958); ILL. REV. STAT. CH. 111 2/3, § 36 (1961); IND. STAT. ANN. § 55-114 (1951); KY. REV. STAT. § 276.170 (1955); N.C. G.S. § 62-125 (1960); and OHIO REV. CODE § 4909.27 (1958).

will not necessarily be subject to service in all the jurisdictions. If, upon injunction suits being brought, judges in the different jurisdictions take differing views of the lawfulness of the proposed rates, as could well happen, the result will be that in some places (and over some railroads) the rates will take effect, in others they will not, while in still others, they may become effective in part only. The resulting lack of uniformity would lead directly to the evils envisioned in the leading case establishing the doctrine of primary jurisdiction, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-441. (And *cf. Baltimore & O. R. Co.* v. *United States ex rel Pitcairn Coal Co.*, 215 U.S. 481, 496.)

The lack of uniformity in rates resulting from a holding that the courts have jurisdiction to enjoin rates before determination of their lawfulness by the Commission would render largely nugatory the statutory letter and policy against undue preference and discrimination among shippers and places.

In *Abilene* the Supreme Court was speaking to the need for uniformly enforcing existing rates, rather than that for the uniform effectiveness of new rates; but judged in terms of either practical consequences or principle, refusal by the courts to accord primary jurisdiction to the Commission in deciding the lawfulness of existing rates, and the courts' misconstruing § 15(7) and undertaking to suspend (enjoin) new rates in advance of Commission decision as to their lawfulness, do not differ.

It is no answer to this problem to say that the Supreme Court would serve as the coordinating or unifying tribunal on rate matters. The time element involved

in appeal to this Court would in many instances make this unfeasible; a case could easily become moot before the Court could act. Also, appeal to this Court could be expensive; the costs of a number of such appeals would be harmful to even the most prosperous shippers, carriers and other parties interested in rate matters, and could be disastrous for many. State commissions often intervene in Interstate Commerce Commission rate investigations; and litigation in several forums would be a heavy burden, in terms both of expense and demands on staff personnel.

B. Reduction in Effectiveness of Commission Regulation

If the courts invade what has generally been thought the Commission's exclusive province, the effectiveness of the Commission's regulation of rates must necessarily be diminished, even though the invasion is accomplished under the guise of "preserv[ing] the primary jurisdiction of the . . . Commission." (Pet. Br. 15) The Commission tries, in accord with statutory command, to administer the Interstate Commerce Act to provide for uniform regulation. If courts extend suspension of rates after expiration of the period prescribed in § 15(7), the task of the Commission is vastly increased in complexity. The courts, instead of reviewing Commission action, would be getting right into process of initial decision and regulation, helping the Commission stir the soup as it cooks.

* * * *

It is true that in this case the petitioners seek to have enjoined a rate which the Commission has suspended, and the argument is made that the court is acting in aid of the Commission's jurisdiction. But, the flaws in this contention aside, there is scant reason

to believe that lower courts would consider themselves constrained by this circumstance to enjoin only those rates the Commission has previously suspended, should this Court overturn the decision of the court below. The likelihood is rather that whenever some district court feels a sufficiently appealing case of "irreparable injury" has been made, injunction will issue against proposed carrier rates based on allegations of counsel, and in hurried circumstances the antithesis of the studied decision complex rate matters demand.

Thus, contrary to the contentions of petitioners in their brief, the primary jurisdiction requirement is not just a "rule of convenience", and this is far from being "a situation where the reason for the rule does not exist . . ." (Pet. Br. 15)

CONCLUSION

Therefore, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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